SUPREME COURT. U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 775

CHEMICAL CLEANING, INC., JOHN H. RUSCH and GEORGE LEWIS,

Petitioners,

vs.

THE DOW CHEMICAL COMPANY,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Date: November 16, 1967.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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STATEMENT OF THE CASE.

Although the statement submitted by petitioners (hereafter defendants) includes some obviously argumentative matters, it is an adequate recital of the facts material to the questions presented.

ARGUMENT.

Question Number One:

The question is not properly before the court for the following reasons:

a. The alleged prior art patent is not in the record.

b. The patent was not offered under Rule 43(c).

c. This is a contempt action and the actions of defendants are contemptuous whether the original decree was proper or not. Defendants did not seek to set aside that decree.

Question Number Two:

The district court found, in findings of fact which have never been challenged, that defendants followed the precise steps of the patent in suit. The patent calls for the use of thiourea in the presence of hot acid to remove, and keep removed, copper from the walls of high pressure steam boilers. Without the thiourea the copper which is removed is redeposited.

Defendants employed a compound of thiourea and formaldehyde which decomposes in the presence of hot acid to form thiourea in the amounts called for in the patent in suit. Defendants vigorously denied there was this decomposition but the court in findings 10-19 (R. 434-8) found it to be so. The district court found the use of defendants' product "in fact the use of thiourea" (F. F. 27, R. 441).* Those findings are not challenged. The finding of equivalency of the proceedings is therefore academic, but is likewise based on findings of fact which are unchallenged.

*Defendants did not include the Findings of Fact in the Appendix to their petition. Because of its importance and for the convenience of the Court, Finding of Fact 27 is printed in the Appendix hereto.

Question Number Three:

One does not escape infringement by obtaining a later patent, *Temco Elec. Motor Co.* v. *Apco Mfg. Co.*, 275 U. S. 319, 328 (1928).

Question three is not justified by the record. Defendants did introduce their patent. It was considered and found irrelevant. Defendants' complaint that this amounts to a holding on invalidity is quite unsound. Operation under an improvement patent would always infringe a basic patent. The issuance of a patent does not give the patentee the right to make anything. It merely gives him the right to exclude others from making, using or selling the patented product or process, *Sears Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, 229-30 (1964).

We cannot refrain from commenting on the reckless charges of petitioners that they were "shabbily" treated by the district court and the court of appeals. The finding was of contempt. These reckless allegations highlight the contemptuous attitude of defendants and their counsel.

Conclusion.

No important question of federal law is involved nor is there a conflict with applicable decisions of this Court. The petition for writ of certiorari should be denied.

Respectfully submitted,

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